1795.

BINGHAM, Plaintiff in Err. *verſus* CABBOT *et al.*

THIS was a writ of errror to remove the proceedings from the Circuit Court, for the diſtrict of *Maſſachuſetts*; and on the return of the reccord, it appeared, that the defendants in error, being joint owners of the armed ſhip called the *Pilgrim*, formerly commanded by *Hugh Hill*, had inſtituted an action on the caſe againſt the Plaintiff in error, in the Circuit Court for the diſtrict of *Maſſachuſetts*, of *June* Term, 1794. in which a declaration was filed, containing the following counts:—1ſt *Count*. That the Plaintiff in Error, at *St. Pierre*, on the 8th of *May*, 1779, was indebted to the Defendants in Error in the ſum of 16,969 dollars and 69 cents, for goods ſold and delivered, according to the account annexed; which account was in theſe words:—"*William Bingham*, Eſq. to the owners of the privateer ſhip *Pilgrim*, commanded in the late war by *Hugh Hill*, on her firſt cruiſe, Dr.

1779, *8th May*.	To 1000 barrels of flour he received at *Martinique*, or from on board the privateer *Hope*, *Ole Heilm* maſter, captured by the ſhip *Pilgrim*, and carried into *Martinique*, previous to 8th *May*, 1779, at 140 livres currency per barrel, - livres, 140,000 which ſum in the currency of the *United States*, is - - -	16,969 69
	Intereſt to 9th *January*, 1793, -	13,915 84
	Dolls.	30,885 53"

2d *Count*. *Quantum valebat* for 1000 barrels of flour, with an averment that they are worth 16,969 dollars 69 cents. 3d *Count*. Money had and received by the plaintiff in error, to the uſe of the defendant in error. 4th *Count*. That the plaintiff in error was bailiff of the ſame flour, to ſell and account for it to the defendants in error; with an averment that the flour had been long ſold but never accounted for. 5th *Count*. *Quantum valebat* for 500 barrels of the like flour, with an averment that it was worth 10,000 dollars. 6th. *Count*. *Quantum valebat* for one undivided moiety of 1000 barrels of flour, with an averment that it was worth 10,000 dollars. The plea of *non aſſumpſit* was entered to this declaration; and thereupon iſſue was joined.

The material facts attached to the cauſe were of the following import:—The *Pilgrim*, being on a cruiſe off the Rock of

1795. of *Liſbon*, on the 19th of *November*, 1778, captured a brig called the *Hope*, *Ole Heilm* commander, and put on board *William Carlton*, as a prize-maſter, who carried the ſuppoſed prize, on the 15th *January*, 1779, into *Martinique*, where the plaintiff in error reſided as a public agent of the *United States*. On examination it appeared that the prize was *Daniſh* property, and that her cargo belonged to *Portugueſe* merchants; both thoſe nations being at peace with *France* and *America*; but there being no courts of admiralty eſtabliſhed at that time in *Martinique*, competent to decide on the validity of captures as prize, made by *American* veſſels, and the neutral captain after a long detention, on account of repairs, being ſolicitous to depart, the *Marquis de Bouille*, governor of the Iſland (to whom authority was delegated by the Conſtitution of the *French* government, to ſupply the deficient parts of the civil polity) made the following order, dated the 2d *October*, 1779, which was regiſtered in the admiralty office of the borough of *St. Pierre*. "*Francis Claude Amour*, *Marquis de Bouille*, *Marſhal de Camp*, of the King's armies, commander general of the *French* troops, militia, fortifications, and artillery of the *French* Windward Iſlands; and governor and lieutenant general of the iſlands of *Martinique* and *Dominique*; *We do certify*, that the *American* privateer, named the *Pilgrim*, having conducted into the iſland of *Martinique*, a *Daniſh* brigantine, loaded on account of the ſubjects of His Moſt Faithful Majeſty, as far as appeared to us, and not on account of the ſubjects of the King of *England*, We have ordered that the ſaid cargo in litigation ſhould be ſold, and the freight paid to the captain of the *Daniſh* brig, out of the cargo under the care and direction of *William Bingham*, agent of Congreſs: And the nett proceeds, of ſaid cargo, deduction made of all other charges, ſhould remain in the hands of ſaid *Bingham*, to deliver it to whomſoever it may appertain, agreeable to the judgment and orders of Congreſs.

(Signed) BOUILLE, &c."

Before, however, the *Marquis de Bouille's* orders were iſſued, Mr. *Bingham* had taken the cargo of the *Hope* into his cuſtody; and on the 2d of *February*, 1779, addreſſed a letter to the Commercial Committee of Congreſs, in which, after mentioning the capture and arrival of the prize, he ſtates, "that upon receipt of the papers (of which he then tranſmitted copies) found on board, he laid them before the judge of the court of Admiralty at *Martinique*, who was of opinion that neither the veſſel nor cargo could with any propriety be moleſted on the high ſeas, by either *American* or *French* armed veſſels. But (Mr. *Bingham* adds) that as this veſſel is incapable of proceeding

ing on an *European* voyage, without great repairs, which will naturally ſubject her to a conſiderable detention; and as her cargo conſiſts of a periſhable commodity, he ſhall diſpoſe of it at *Martinique*, pay the captain his freight, what damages he may be entitled to, and ſhall give him permiſſion to take his departure. Indeed the General inſiſts that the cargo ſhould be diſpoſed of, as the Iſland is in great want of flour; and as the ſales will be more advantageous to the owners here, it may make the misfortune leſs heavy on the concerned. The proceeds, after paying the neceſſary expences of the veſſel, ſhall be placed (continues Mr. *Bingham*) to the credit of the Commercial Committee of Congreſs, to aſſiſt in paying the advances which he had made at *Martinique* on the public account: and he is the more inclined to convert it to this uſe, as he is perſuaded, that Congreſs will not have to reimburſe it, until the claim of the real owner in *Europe* is made clear and manifeſt. It appeared by an account of ſales, ſigned by Mr. *Bingham* on the 8th of *May*, 1779, that the flour had been ſold, at different periods, from the 21ſt of *January* to the 8th of *May*, 1779, and that the nett proceeds, which he placed "to the credit of the Owners of prize flour," amounted to *livres* 107,621 14 6. 1795.

The owners of the *Pilgrim* being diſſatisfied with the proceedings that had taken place in relation to the cargo of the *Hope*, inſtituted in the Common Pleas of *Suffolk* county, *Maſſachuſetts*, an action of Trover for the 1000 barrels of flour, in the name of *William Carlton*, the prize-maſter, againſt Mr. *Bingham*; and attached Mr. *Bingham's* property, in the hands of *Mr. Thomas Ruſſel*, of *Boſton*, to anſwer the judgment of the court. To this action (which was brought to *October* Term, 1779) the defendant pleaded not guilty, iſſue was thereupon joined, and judgment was rendered for the defendant. An appeal was brought to the Supreme Judicial Court of *Maſſachuſetts*, at *February* Term, 1781, by *William Carlton*; it was tried on the 17th *February*, 1784; a verdict was given for Mr. *Bingham*, the defendant; and judgment was entered accordingly. When this action at law was commenced, Mr. *Bingham*, by a letter dated at *Martinique*, the 6th of *October*, 1779, and addreſſed to the Commercial Committee of Congreſs, remonſtrated againſt the proceeding, as he had acted *bona fide*, in his official character; and Congreſs paſſed the following reſolutions upon the ſubject:—"*November* 30, 1779. "*Reſolved*, That Mr. *Bingham's* letter of the 6th of *October* laſt, with the papers encloſed therein, and marked No. 1, 2, 3, 4, together with a certified copy of his appointment to the place of Continental Agent, be tranſmitted by the Preſident to the legiſlature

1795. legiſlature of the State of *Maſſachuſetts-Bay*, with the following letter:

"*Gentlemen*,

"I am directed by Congreſs to tranſmit to you the encloſed papers from Mr. *Bingham*. They contain an account of his proceedings relative to a veſſel, ſaid to be *Daniſh* property, captured by the ſloop *Pilgrim*, and carried into *Martinique*, about which, as he ſays, a ſuit is now commenced againſt him in your Superior Court. Upon a full examination of the papers, you will judge of the meaſures, which ought to be adopted to prevent, on the one hand, injuſtice to individuals, and on the other, the embarraſſment of agents, who are obliged to conform to the will of the ruling powers at the place of their reſidence. As courts are now inſtituted at *Martinique* for the trial of ſuch cauſes, Congreſs ſubmit to you whether it would not be adviſeable to ſtop the ſuit already commenced, till judgment is obtained upon the principal queſtion; after which it will be in Mr. *Bingham's* power to diſcharge himſelf, by delivering to the true owners the property placed in his hands for their uſe. If you ſhould be of a contrary opinion, they requeſt you to furniſh Mr. *Bingham's* agent with the encloſed papers. I am, &c."

The Legiſlature of *Maſſachuſetts* taking no order on this application, Congreſs again entered upon the ſubject, and on the 20th *June*, 1780, "*Reſolved*, That the General of *Martinique*, in ordering the cargo of the brig *Hope* to be ſold, and the money to be depoſited in the hands of Mr. *W. Bingham*, till the legality of the capture could be proved, (no courts being at that time inſtituted for the determining of ſuch captures in that iſland,) ſhewed the ſtricteſt attention to the rights of the claimants, and the higheſt reſpect to the opinion of Congreſs;

"That Mr. *W. Bingham*, in receiving the ſame, only acted in obedience to the commands of the General of *Martinique*, and in conformity with his duty as agent for the *United States*.

"*Reſolved*, That Congreſs will defray all the expences that Mr. *William Bingham* may be put to by reaſon of the ſuits now depending, or which may hereafter be brought againſt him in the State of *Maſſachuſetts Bay*, on account of the brig *Hope*, or her cargo, claimed as prize by the owners, maſter and mariners of the private ſhip of war called the *Pilgrim*.

"And whereas the goods of the ſaid *William Bingham*, to a very conſiderable amount, are attached in the ſaid ſuits now depending in the hands of the factors of the ſaid *W. Bingham*, to his great injury:

Reſolved,

"*Reſolved*, That the General Court of the State of *Maſſachuſetts Bay*, be requeſted to diſcharge the property of the ſaid *W. Bingham* from the ſaid attachment: Congreſs hereby pledging themſelves to pay all ſuch ſums of money, with coſts of ſuit, as may be recovered againſt the ſaid *W. Bingham*, in either or both the above actions." 1795.

"*Reſolved*, That the Navy Council at Boſton, be directed to give ſuch ſecurity, in the name of the *United States*, as the court may require, and to direct the counſel now employed by Mr. *Bingham*, in the defence of the ſaid actions.

Such were the circumſtances of the cauſe now under conſideration when it came to trial in the Circuit Court, before *Juſtice* CUSHING, an aſſociate Judge of the Supreme Court alone.* Mr. Bingham's counſel offered to give the following documents in evidence to the jury: 1. Office copies certified under the hand and ſeal of the Secretary of State, of the papers found on board the *Hope*, of depoſitions relating to the capture, taken officially before Mr. Bingham, as a public agent; of Mr. Bingham's letter of the 2d of February, 1779, and other ſubſequent correſpondence and depoſitions in relation to the capture, addreſſed to the commercial committee of Congreſs; and of the Marquis de Bouille's order. Theſe documents were ſtitched together, and were included in one certificate from the Secretary of State. 2. The account Sales of the flour at Martinique, dated the 8th of May, 1779, and the account Sales of the property which had been attached in the action of Trover, brought by Carlton *v.* Bingham. 3. The record in the Inferior and Superior Courts of Maſſachuſetts, in the caſe of Carlton *v.* Bingham. 4. The Reſolutions of Congreſs, paſſed reſpectively on the 3d Nov. 1779, and the 20th June, 1780. But the Court rejected all the evidence; (though it would ſeem from the record, that a part of it muſt have been admitted in the courſe of the Plaintiff's proofs) and a Bill of Exceptions was tendered and allowed, in the following words:

"And the ſaid William Bingham, being now here in Court, by James Sullivan and Chriſtopher Gore, Eſquires, his attornies, the iſſue joined in the ſame caſe, and a jury on the ſame duly and legally impannelled, prays leave to file a Bill of Exceptions to the determination of the ſaid Court here had on the evidence, which by the ſaid Bingham is offered in this caſe, and by which determination the ſaid evidence is excluded, and the ſaid Bingham is denied the advantage of giving the ſame to the jury in the ſame caſe, viz. The ſeveral copies atteſted by Tho-

* In the Caption, indeed, of the record, Juſtice *Lowell*, the Diſtrict Judge, is named as preſent; but it is contradicted by a ſpecial entry in the margin, in theſe words:—"N. B. Judge *Lowell* did not ſit in this cauſe."

mas

1795. mas Jefferſon, and which are hereunto annexed, and numbered from one to eighteen incluſively; and alſo three other papers, numbered 23, 24, 25; all which papers had a tendency to prove, that no intereſt ought to be allowed by the jury, on the ſum for which the Plaintiffs declare, in their third count, or damages, for the detention of the money therein mentioned and declared on; and by the excluſion whereof, the ſaid Bingham does ſuſtain manifeſt injury and wrong, as he conceives. And the ſaid Bingham further files his exception to the determination of the ſame Court, by which the papers numbered from 27 to 36, incluſively, were excluded; and which papers contain a complete record of the Supreme Judicial Court of the commonwealth of Maſſachuſetts, wherein William Carlton, who had been, as the ſaid Bingham avers, and as appears by the evidence in the caſe, in poſſeſſion of the ſame flour declared on in the ſaid third count in the plaintiff's declaration, had ſued in an action of trover for the ſame; and by which record it appears that ſuch proceedings were had in the ſame Court, as would fully ſhew, as the ſaid Bingham conceives, that the ſaid Plaintiffs had no legal right to change the ſame action, after the judgment in the ſame record ſpecified, into an action of aſſumpſit, or as principals to implead the ſaid Bingham again after the cauſe of action had been tried, adjudged, and determined, in an action of Trover, wherein the ſpecial Bailiffs of the Plaintiffs, as the ſaid Bingham avers, in this ſuit had ſo impleaded the ſaid Bingham to verdict and judgment in the ſame cauſe, and for the ſame cauſe of action. And that the determination to reject the ſame papers, is wrong—becauſe that if the ſame papers are admitted to be given to the jury, the evidence therein contained will have a legal tendency to leſſen the damages, if not wholly defeat the action of the Plaintiffs.

"And the ſaid Bingham further files in this his Bill of Exceptions, that the Court did reject and refuſe to have read to the jury in the trial as evidence, a Reſolution of the Congreſs of the United States of America, of the thirteenth of November, 1779; alſo another Reſolution of the ſame Congreſs of the twentieth of June, 1780, both which were concerning the ſubject matter of the ſuit.

"Wherefore, that juſtice, by due proceſs of law, may be done, in this caſe, the ſaid Bingham, by the underſigned his Counſel, prays the Court here, that this his Bill of Exceptions may be filed and certified as the law directs.

JA. SULLIVAN,
C. GORE.

"June 16, 1794. Allowed to be filed per
Wm. CUSHING, Judge of
ſaid Circuit Court."

A verdict was then given for the Defendant in error, upon the third count, for money had and received, damages 29,780 dollars 16 cents, and for the Plaintiff in error on all the other counts: and, thereupon, judgment was rendered for damages and costs. A motion was made on behalf of the Plaintiff in error, for a new trial, on two grounds:—1. Excessive damages: and 2. A misdirection in the Judge's charge to the jury; the Judge having directed the jury, "that the law was such, that, on the evidence offered in the cause, the Plaintiffs ought to recover; whereas the evidence given was such as clearly proved, that the flour mentioned in the third count, was the joint property of the Plaintiffs below, as they were owners of the ship *Pilgrim*, and of the masters, mariners and company on board the same ship; to wit. of the Plaintiffs below, and *Hugh Hill*, and others, jointly: by which evidence, if any contract was proved in the case, it was a contract between the said *Bingham* with the Plaintiffs and divers other persons jointly, who are not Plaintiffs, or mentioned in the writ, and who are now alive within the *United States.*" But a new trial was refused. 1795.

On the return of the record, (to which were annexed several depositions and papers produced in the court below, as well as the papers referred to in the Bill of Exceptions) the following errors were assigned; the Defendant in error pleaded *in nullo est erratum*; and issue was thereupon joined:

1. That judgment had been given for the Plaintiff, instead of the Defendant below, on the 3d Count.

2. That the Circuit Court, proceeding as a Court of Common Law, in an action on the case, for money had and received, &c. had no jurisdiction of the cause; the question, as it appears on the record, being a question of prize, or no prize, or wholly dependent thereon; and, as such, it was, exclusively of Admiralty jurisdiction.

3. That the evidence referred to in the Bill of Exceptions, ought not to have been rejected on the trial of the cause.

The argument which) commenced on the 15th of February, 1795) was conducted by *Bradford* (Attorney-General of the *United States*) and *Lewis*, for the Plaintiff in error; and by *Ingersoll*, *Dexter*, and *E. Tilghman*, for the Defendant in error.

THE COURT desiring the counsel, in the first instance, to discuss the question of jurisdiction, the case presents itself under the following general heads. I. Exceptions to the jurisdiction. II. Exceptions to the record.

I. The Exceptions to the jurisdiction.

For the *Plaintiff in Error.* The subject matter of the action is prize, or no prize; and it is, with all its consequences, exclusively of Admiralty jurisdiction. The action is not tres-

1795. paſs, for a *tort* in taking the goods; but it is an action of *Aſſumpſit*; and the plaintiffs below cannot make out a right to recover from the defendant, who is charged as receiver and agent, unleſs they firſt prove the veſſel to be a prize. They muſt ſhew to whom the property belonged; and if the court adjudge, that the proceeds of the ſales was money had and received to the uſe of the plaintiff; it is, in effect, pronouncing a ſentence, that the veſſel (which has not even yet been condemned) was a prize. *Carth.* 474. *Doug.* 596. *(in not.)* 3 *T. Rep.* 344. 4 *T. Rep.* 382. 394. 1 *Dall. Rep.* 221. 2 *Dall. Rep.*

For the *Defendant in Error.* It is true, as a general propoſition, that all prize cauſes, and their incidents, are of Admiralty juriſdiction; but there are ſome limitations to the operation of the rule. In the preſent caſe, there is, in fact, no queſtion of prize; but even in caſes, where that queſtion is naturally involved, the courts of common law have, incidentally, tried and decided it; as in caſes upon policies of inſurance and ranſom. 3 *Burr.* 1734. *Doug.* 579. 580. 2 *Lev.* 25. 1 *Vent.* 173. 4 *Inſt.* 138. 1 *Raym.* 271. 3 *Woodes.* 450. 1. 2. 3. 2 *Saund.* 259. 2 *Burr.* 683. 693. 1 *Wilſ.* 229. *Doug.* 310. *to* 314. 4 *T. Rep.* 393. 1 *H. Bl.* 522. In a variety of caſes, likewiſe, the ſubject may be traced to an original queſtion of prize, and yet the Admiralty can take no cognizance of it. Suppoſe, for inſtance, a captor ſells his prize; he may, ſurely, bring an action at common law for the purchaſe money: or, if a Taylor ſhould detain a man's coat, it will be no anſwer to an action of Trover, that the cloth was taken in a prize. Indeed, it may be ſtated, generally, that whenever the queſtion of prize is at reſt, the admiralty juriſdiction ceaſes. 4 *T. Rep.* 432. 2 *Dall. Rep.* 174. 1 *Wilſ.* 211. 4 *T. Rep.* 393. *Arg.* 3 *T. Rep.* 342. 8. 1 *Burr.* 8. 526. *Doug.* 572 *to* 591. The excluſive juriſdiction of the Admiralty does not, then, depend on the property having been originally taken as prize; but on the nature of the controverſy, ariſing on the high ſeas, affecting, uſually, the rights and intereſts of different States; and, conſequently, depending on principles, which ought to be decided by the law of nations, and not by the municipal law of either country. It is not contended, however, that in every cauſe which appears to be between citizen and citizen, the courts of common law are always to decide; for, if the general nature of the controverſy may involve foreign ſubjects, and foreign rights, the Admiralty is the regular and appropriate tribunal. The poſition extends no further, than to thoſe caſes, which commonly occur on land, between citizen and citizen (though originating in a capture at ſea) and with reſpect to which the Admiralty has not any, much leſs an excluſive

excluſive, juriſdiction. Such is the cauſe now litigated. It is a tranſaction on land between the captors of the veſſel, and their agent. The original owners are not, and could not be parties to the ſuit; and their rights cannot be ſet up to juſtify the Plaintiff in error, who does not claim under them, nor act by their authority. Then, it is to be obſerved, that there is nothing upon the record to ſhew that the controverſy grew out of a prize cauſe. Though the declaration ſtates the Plaintiffs to be owners of the privateer, it does not ſtate that the property in diſpute was captured by her; and the verdict is only upon the third count in the declaration (the count for money had and received) and all the other counts, which refer to the capture, are put, by the finding of the jury, entirely out of the caſe.* The third Count does not refer to the account annexed 1795.

* WILSON, *Juſtice.* The bill of exceptions ſtates the evidence offered and rejected; and it forms a part of the record. Beſides, this is a queſtion of juriſdiction: And was not juriſdiction as much exerciſed in relation to the counts, which were diſpoſed of in favor of the defendant below, as in relation to the count, which was diſpoſed of, in favor of the plaintiffs?

PATTERSON, *Juſtice.* Is it contended, that the account annexed to the declaration does not ſupport the third count, on which the verdict is given; and that we cannot take notice of it?

Dexter, for the Defendant in Error. The bill of exceptions does not include all the interpolated evidence, and refers to evidence not tranſmitted: It does not ſtate what was given in evidence, but only what was rejected. With reſpect to the account annexed, it is only conſidered as making a part of the record, in relation to thoſe counts of the declaration which refer to it; and all thoſe counts are put out of the caſe by the finding of the jury. The third count does not refer to it; and, indeed, if there had only been a ſingle count for money had and received, the account would not have been annexed, agreeably to the practice in the courts of *Maſſachuſetts*

PATTERSON, *Juſtice.* What is to be regarded as the record, ſeems to be a preliminary point, material to be ſettled; and we muſt either adopt the peculiar practice of *Maſſachuſetts*, or purſue the general practice of the common law.

Dexter. It is the practice in *Maſſachuſetts*, to accompany an exemplification with all the written evidence and papers; but the doings of the parties, and of the court, are alone to be taken as conſtituting the record. The *oral* teſtimony cannot be tranſmitted; and yet that may be more eſſential to the iſſue, than what appears in writing.

Bradford, for the Plaintiff in Error. The facts muſt be conſidered as they appear upon the whole record; and by the exhibit of the plaintiffs themſelves, annexed to the declaration, it appears to be a queſtion of prize.

CUSHING, *Juſtice.* There was other evidence (ſome of it *parol*) given on the trial, beſides what now appears on the record. If, then, we ſuppoſe that contradictory evidence may be given to the jury, and that they have a right to believe the teſtimony of one witneſs, and to reject the teſtimony of another, I am at a loſs to conceive, how the court could, under ſuch circumſtances, ſtate what was proved on the trial. But with reſpect to the record, the practice of *Maſſachuſetts* is plain and obvious. The declaration and pleadings in every ſuit, are entered in a book; and all the papers and exhibits are filed in the Clerk's office. The book is alone deemed the record; and the papers and exhibits are only referred to, for the purpoſe of aſcertaining what writ iſſued, or what depoſitions have been taken.

1795 annexed to the declaration; and, therefore, that account cannot be taken into view, to ſhew that the queſtion depends on a capture as prize. The depoſitions and papers arbitrarily connected with the record by the Clerk below (and which do not compriſe all the evidence given on the trial) are not legally a part of the record; they cannot be reſorted to, in order to aſcertain the nature of the controverſy; but muſt be rejected as ſurpluſage: And this court cannot look at the ſtatement in the bill of exceptions, to diſcover the complexion of the cauſe; for, the only point to be decided, in that reſpect, is—whether the court below was, or was not, right, in rejecting the evidence that was offered. *Bull. N. P.* 315. 3 *Burr.* 1745. Beſides, this court cannot reverſe the judgment for error in fact; (1 *Vol. Swift's Edit. f.* 22. *p.* 62.) and, therefore, they cannot, in the preſent caſe, any more than in the caſe of a ſpecial verdict, infer a fact, or take notice of any fact reſulting from the depoſitions and papers annexed to the record, which the jury has not expreſsly found.* 3 *Bl. Com.* 407. The proof on the third count, may have been of money received to the plaintiff's uſe, independent of the account annexed, or of any queſtion relating to the prize; and, as the court will preſume every thing, that they reaſonably and lawfully can, in ſupport of a verdict and judgment, the ſum given in damages will be taken to reach the juſtice of the caſe. 1 *Wils.* 1. 255. 3 *Burr.* 1786. 1 *Stra.* 608. 9 *Vin. Abr.* 598. 10 *Vin. Abr.* 1. *pl.* 1. But, ſurely, it is now too late to make the exception to the juriſdiction. 4 *Burr.* 2037. The defendant below ought to have brought the queſtion forward by way of plea; or, at leaſt, if it appeared on the evidence, he ſhould have required the opinion of the court in the charge to the jury; but whenever evidence is allowed to go to a jury, without exception, the verdict is concluſive; and the evidence can never afterwards be examined on a writ of error. 2 *Lutw.* 1566. *Holt.* 301. So what is pleadable in abatment, is not aſſignable as error. 4 *Burr.* 2037. Taking, therefore, a full and candid view of the caſe, as it appears upon what may legally be denominated the record, it is not a caſe of prize, but a caſe of principal and factor. The plaintiff in error obtained poſſeſſion of the flour under the authority, and as the agent, of the defendants in error: he cannot diſpute that authority; the flour, in his poſſeſſion, belonged to his principal; and when it was ſold, the money was the money of his principal. This doctrine does not exclude the idea of an inveſtigation of the lawfulneſs of the capture, at a proper time, between proper parties, and before a proper

* PATTERSON, *Juſtice.* The court cannot infer a fact from a fact; but, if the fact is on the record, we may infer the law.

a proper tribunal. If a competent Court of Admiralty had been eſtabliſhed at *Martinique*, an immediate proceeding there, would have obviated every difficulty; and it ought not to be urged by the plaintiff in error, that the captors have never ſince proceeded to condemn the veſſel, as it was by his act they were deprived of the ſhip's papers and other means for doing ſo. But even an *American* Court of Admiralty may take cognizance of the queſtion of prize; and, in the hands of the captors, the money would always be liable to the claims of the captured. To maintain the preſent action, however, a ſpecial property is ſufficient; and the captors have a ſpecial property before the condemnation. There are, indeed, many inſtances of prizes being brought into port and ſold, before they were condemned; upon the general principle, that the property is veſted in the captor, whenever the original owner has loſt the *ſpes recuperandi*. But when the plaintiff in error ſold the prize goods without any adjudication, at a place where no Court of Admiralty exiſted, the defendants in error had no remedy againſt him, but at common law. It does not even appear on the record, that the plaintiff in error took poſſeſſion of the goods, by order of the *Marquis de Bouille*; but, at all events, it is clear, that the Marquis had no right to examine the validity of the prize; while, on the other hand, the prize maſter had a right, under the 17th article of the treaty with *France*, to bring the prize from *Martinique* to *America*. 1795.

For *the Plaintiff in error*, in reply. There is no magic in the word "record," to preclude the court from exerciſing their ſenſes and judgment, upon the inſpection and conſtruction of an inſtrument, which the judge and clerk of the Circuit Court, have officially certified to be an exemplification of all the proceedings in the cauſe. With what juſtice can it be ſaid, that the papers forming a part of this exemplification, have no relation to the controverſy? Are the commiſſion of the privateer, the account ſales of the prize goods, and the order of the *Marquis de Bouille*, entirely unconnected with the demand of the plaintiffs, and the anſwer of the defendant? The great, the only point in controverſy, was—whether, under every circumſtance of the caſe, Mr. *Bingham* was reſponſible to the owners of the privateer, for certain goods, which the privateer had captured as prize? The declaration in every count claims the ſame ſum that appears in the account ſales, as the proceeds of the prize goods; and the reaſons urged on the motion for a new trial, ſhew that the object of the third count, on which the verdict had been given, was the ſame as the object of the other counts, to which alone, it has been ſaid, the account ſales apply. But, it is alſo contended, that the court can infer nothing from all theſe documents; ſince they "are to be conſidered, not as facts, but only as

1795. as the evidence of facts, proper for a jury, exclusively, to decide upon." The truth, however, is, that, it is the peculiar province of the court to construe deeds and papers; and to declare their legal operation. It is, surely, extravagant to assert, that the court are incompetent to determine the meaning and effect of the privateer's commission, or the *Marquis de Bouille's* order. If it satisfactorily appears, that all the proceedings and facts, which belong to the cause, have been returned, whether the return is according to the technical precision of *Westminster Hall*, or the informal practice of the courts of *Massachusetts*, being judicially here, it must be noticed in all its parts by the court. The only general question, therefore, upon the point of jurisdiction, is—whether from all the facts, spread throughout the proceedings of the Circuit Court, the cause of action sufficiently appears? And a summary of the evidence on the record will demonstrate that it is a prize cause. 1. The Plaintiffs sue as owners of the privateer *Pilgrim*. This raises a legal presumption that their whole demand is in that character; and that it must relate to some transaction of the privateer. 2. The account annexed to the declaration, corroborates and confirms that presumption. It states expressly, that the suit is brought to recover the proceeds of flour captured by the *Pilgrim*; and whether it is usual, or not, to annex such an account to an action simply for money had and received, in the present instance it was manifestly intended to exhibit the whole of the Plaintiff's claim. 3. The commission of this privateer, and the papers taken on board the prize, are the very exhibits to be produced on a libel for condemnation; and prove, unequivocally, that the cause is of Admiralty jurisdiction. 4th. The order of the *Marquis de Bouille*, which was registered in the Admiralty of *Martinique*, shews the tenure by which Mr. *Bingham* held the property; that is, as a deposit of the proceeds of goods taken as prize, on the high seas. Hence, from the commencement to the close of the transaction, as it appears on the return to the writ of error, nothing is to be traced as the cause of action, but a capture as prize and its consequences*. But, in order to escape from the pressure of this proof, the most extraordinary subterfuges are employed; and the principle, that the question of prize belongs exclusively to the Admiralty jurisdiction, is so refined upon, as to be rendered

* PATTERSON, *Justice*. Does it appear from any thing, besides the *Marquis de Bouille's* order, that the cargo was converted into cash?

Bradford. The deposition of *Stephen Webb*, states, that, on behalf of the Defendants in error, he made a demand on Mr. *Bingham* for the *money*, as the proceeds of the flour captured by the *Pilgrim*; to which that gentleman answered, "that he had taken the property for the use of the government of the *United States*."

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inſenſible and illuſory. Sometimes, it is urged, that the Plaintiff in error has tortiouſly poſſeſſed himſelf of the property of the Defendants; ſometimes, in direct contradiction to that idea, he is conſidered as their agent, or factor; and, finally, purſuing a diſtinct courſe from either, it has been ſaid, that there are neutrals concerned, who alone are entitled to diſpute the validity of the prize, with the Defendants in error. The ground taken by the Plaintiff in error is, on the other hand, clear, conſiſtent, and ſimple:---it is merely this, that the Defendant below received the property from the *Marq. de Bouille*, as his agent, in the firſt inſtance, in truſt, "to be delivered to whomſoever it may appertain, agreeably to the judgment of Congreſs." The truſt, therefore, conſtituted Mr. *Bingham* the eventual agent of thoſe perſons only to whom the property really belonged;—of the Defendants in error, if they could ſhew it was lawful prize; but if not, the legal promiſe reſulted to the original owners. As far as the *Marquis de Bouille* could, he had determined the property to be neutral; and every thing that is now ſaid by the Defendants in error, might be ſaid with, at leaſt equal force, by the neutral claimants, to render Mr. *Bingham* reſponſible to them. 'Till, therefore, the validity of the prize is eſtabliſhed, the object of his truſt cannot be aſcertained; and the validity of the prize can only be eſtabliſhed in a Court of Admiralty. Thus, the fallacy of the oppoſite argument is expoſed, the moment it is conſidered, that there was no expreſs promiſe of the Plaintiff in error to account to the Defendants; for, if ſuch a promiſe had been made, the queſtion of prize would be merged in the *aſſumpſit*; and it is conceded, that an action at common law might have been maintained (as in *Henderſon v. Clarkſon*, 2 *Dall. Rep. p.* 168, 9, 174.) unleſs a neutral claimant interpoſed, and forbade the payment. The caſe of *Wemys verſus Linzee, et al. Doug.* 310, has been conſiderably ſhaken by the caſe of *Home verſus Camden, et al.* 1 *H. Bl.* 476; where a court of Admiralty was finally conſidered as the proper juriſdiction for effectuating an Admiralty ſentence; but even the former caſe, properly taken, affords no ſupport to the oppoſite doctrine; for, it proceeded entirely upon a conſtruction of the prize ſtatute of England. 1 *H. Bl.* 522. The prize-agent is created under that ſtatute; he is not compellable to make diſtribution till the prize has been condemned, (when there is a veſted right in the captors 1 *Wils.* 211) and all the circumſtances ſhew, that there had been a condemnation before the action was brought, though the fact is not mentioned in the Report. On a writ of error, in the caſe of *Home verſus Camden et al.* 4 *T. Rep.* 382. the judgment was reverſed; becauſe the prize act did not neceſſarily take away the juriſdiction of the Admiralty, while it was the foundation 1795.

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1795. dation of all the common law jurisdiction upon the subject. In arguing that writ of error, the counsel urged, that "in no instance can any adverse action be maintained at law for the proceeds of prize, until the demand has been liquidated by the sentence of the proper court of jurisdiction:" 4 *T. Rep.* 385. And *Judge* SHIPPEN, in a late important decision (*Ross et al. Exo'rs. vs. Rittenhouse*, 2 *Dall. Rep. p.* 160.) reasons upon, and affirms, the same proposition. Nor is it material, whether neutrals and foreigners are concerned, or not; for, it is the nature of the question, a question of prize, and not the character of the parties to the controversy, that establishes the Admiralty jurisdiction. But even on this point, it is unfortunate, for the opposite position, that all the cases cited (*Le Caux v. Eden*, *Lindo v. Rodney*, *Rous v. Hassard*) are cases between subjects of the same sovereign. *Doug.* 587. But, it has been, likewise urged, that it is now too late to except to the jurisdiction of the Circuit Court: to which, it is answered, that the question could not be made, on the count for money had and received, till the nature and evidence of the demand were exhibited, nor was it necessary to require the opinion of the judge in his charge to the jury; since, a defect of jurisdiction must always be noticed, whenever it appears in the proceedings*.

On the 27th of *February*, the Court delivered their opinion to the following effect.

PATTERSON, *Justice*. Considering, as I do, that all the papers transmitted from the Circuit Court, upon a return to the writ of error, form a part of the record in this cause, I am clearly of opinion, that the subject matter of the controversy, is fully and exclusively of Admiralty jurisdiction.

IREDELL, *Justice*. I find it difficult, to form an opinion on the question of jurisdiction, at this stage of the cause. I concur in thinking, however, that all the papers, which accompany the record, should be considered as a part of it; and, in relation to the original suit, it appears to me, that on the evidence exhibited by Mr. *Bingham*, to shew that he acted under the orders of the *Marquis de Bouille*, the Judge should have charged, and the jury should have found, that he was not responsible to the plaintiffs.

But, still, I am not ready at this moment to decide, that the

* CUSHING, *Justice*. Could not a defect of jurisdiction be taken advantage of, on the general issue?

Bradford. Yes: but should the party chuse to avoid taking advantage of it on the trial, the Court is bound to take notice of it, if, at any time, it appears on the record.

PATTERSON, *Justice*. That is, certainly, the law, if the defect of jurisdiction is apparent on the record. We are now enquiring whether it does so appear.

the Circuit Court had no juriſdiction. Suppoſe the Plaintiffs below had expreſsly ſtated in their declaration, that their cauſe of action was a capture as prize; the court would, probably, have directed a nonſuit; and yet, if the Plaintiffs had perſiſted in anſwering when called, the jury muſt have given a verdict. Suppoſe, again, that the controverſy had appeared from the Defendant's evidence to turn entirely upon the queſtion of prize, the court could not, I conceive (though I ſpeak here with great diffidence) direct the Plaintiffs to be nonſuited, merely on the Defendant's evidence; and, unleſs a juror had been withdrawn by conſent, a verdict muſt, alſo, have been given in this event. It will not be ſufficient to remark, that the court might charge the jury *to find* for the Defendant; becauſe, though the jury will generally reſpect the ſentiments of the court on points of law, they are not bound to deliver a verdict conformably to them. From theſe, and other conſiderations, I do not find myſelf at liberty to decide againſt the juriſdiction of the Circuit Court; though, I repeat, that the jury ought to have been let in to give a verdict in favor of the Defendant. 1795.

WILSON, *Juſtice.* From the proceedings laid before the Court, it appears clearly to my mind, that the queſtion, on which the cauſe muſt be decided, is excluſively of Admiralty juriſdiction.

CUSHING, *Juſtice.* It does not appear to me, from any part of the record, that the Circuit Court had not juriſdiction on the third Count in the declaration. The papers and depoſitions that have been tranſmitted, were, no doubt, produced upon the trial; and, I agree, that they ought to be regarded as a part of the record. But we are not bound to receive for truth, every thing which they alledge; nor, indeed, can we give any of their ſtatements the validity and force of a fact; ſince, they only amount to evidence; and it is the peculiar and excluſive province of the jury to infer facts from the evidence.

That the court had not juriſdiction on thoſe Counts, which ſeem to refer to a queſtion of prize, is no reaſon for excluding a juriſdiction upon the Count, which has no ſuch reference. The contract might be of a different nature; and the parol teſtimony (which does not appear, in any ſhape, on the record) might have ſupported it.

THE COURT, being thus equally divided in their opinions, on the exception to the juriſdiction, directed the Counſel to proceed to the diſcuſſion of

II. The Exceptions to the Record.

For *the Plaintiff in Error.* The exceptions to the record may be claſſed in the following manner:—1ſt. That there was

1795. not a court competent to try the cauſe, and render judgment therein. It appears by the memorandum in the margin of the record, that only one judge ſat on the trial and deciſion, though the Diſtrict Judge was actually preſent; whereas the act of Congreſs requires two judges to conſtitute a Circuit Court. 1 *Vol. Swift's Edit. f.* 4. *p.* 50. 2 *Vol. f.* 1. *p.* 225. 6. except in certain ſpecific caſes, where the latter act empowers one judge of the Supreme Court to hold the Circuit Court alone. But as the general conſtitution of the court requires two judges, and two judges were actually preſent, the reaſon for one only ſitting on the cauſe, ſhould appear on the record to be ſuch as the law allows.—2d. That the action is brought for money had and received, &c; and if any ſuch action would lie, all who are intereſted muſt join in bringing it; whereas there were ſeveral other joint owners of the privateer's prizes (the captors) who are not parties to the ſuit. *Journ. of Cong.* 2 *Vol. p.* 107. In treſpaſs this exception muſt be pleaded in abatement; but in *aſſumpſit* it may be taken advantage of at the trial. *Bull. N. P.* 34. 152. 2 *Stra.* 820. *Gilb. L. E.* 106. In the preſent caſe, the Plaintiffs waved all *tort*; and whatever promiſe the law raiſed, was a promiſe to all intereſted in the property, or its proceeds; which included the mariners, as well as the owners of the privateer. But even if the action could be maintained by the owners of the privateer only; yet, the third Count does not ſtate the promiſe to be to all the owners. A perſon now dead, was a joint owner; but the promiſe is ſtated to be made to *John Cabbot*, the ſurviving partner, and not to *J. & A. Cabbot*, in the life time of *A. &c.*—3d. That a variety of papers and depoſitions offered in evidence by the Plaintiff in error (and ſome of which had actually been given in evidence in behalf of the Defendant in error) together with certain reſolutions of Congreſs, and the exemplification of the record in the former ſuit of *Carlton* and *Bingham*, had been rejected; and if any one of them was improperly rejected, the judgment below muſt be reverſed. The objection to admit thoſe documents, muſt reſt, either upon the form of authentication, or upon the nature of their contents. Thoſe which had been officially depoſited in the Secretary of State's Office, were certified in the form preſcribed by the act of Congreſs; 1 *Vol. p.* 43. *f.* 5; the record of the action of *Carlton* and *Bingham*, was an exemplification under the ſeal of the proper court; the Reſolutions of Congreſs were formally extracted and certified from the Journals; and the whole evidently related to the ſubject in controverſy. Mr. *Bingham* was a mere ſtakeholder; and an indemnity, at leaſt, ſhould have been tendered, before the property was taken from him. But whenever the queſtion of damages aroſe, it was material to ſhew that he had

had acted throughout the buſineſs with fidelity, as a public agent, with the approbation of Congreſs, and in conformity to the truſt repoſed in him by the *Marquis de Bouille*, which did not allow him to pay over the money, till a right to it was eſtabliſhed by deciding the queſtion of prize.* He could only, therefore, defend himſelf by ſhewing all the correſpondence and proceedings as they occurred. In all mercantile caſes, indeed, the correſpondence of an agent is admitted to ſhew the real complexion of the tranſaction; and this is, certainly, the firſt inſtance, in which a court has refuſed to allow the acts, or ordinances, of Congreſs to be read in evidence. With reſpect to the record of *Carlton verſus Bingham*, it might not, perhaps, be regular to give it in evidence as a bar to the ſubſequent action, unleſs it was pleaded; but, on the preſent occaſion, it was only offered to ſhew, that other perſons had ſued for the ſame thing; that Mr. *Bingham* was, in fact, a mere ſtake-holder; and that, therefore, he ought not to deliver the property to any one till the legal ownerſhip was eſtabliſhed, nor be compelled to pay damages, or intereſt, for the detention, whoever might be the owner. A verdict in another cauſe may be given in evidence, though the parties are not the ſame, if the defendant was bailiff, or agent, of the party now ſuing. *Gilb.* 35. So a common carrier may maintain trover for the Principal, or owner, of the goods; and a verdict in that action may be given in evidence, as concluſive againſt the Principal, in an action brought by him againſt the carrier. 2 *Eſpinaſſe*, 335. *Bull. N. P.* 33. 1795.

For the *Defendants in Error.* It muſt be premiſed, that the bill of exceptions, is not fairly drawn, ſince it omits to ſtate the evidence on behalf of the Plaintiffs below, and, therefore, does not bring the points in the cauſe fully before the court. On a writ of error, however, facts are not to be conſidered; 3 *Bl. Com.* 407. and from the ſtatement in a bill of exceptions the court will infer nothing. *Bull. N. P.* 316. 2 *T. Rep.* 55. 125. But to proceed to the exceptions in their order.

1*ſt. Exception.* The court was conſtituted, agreeably to the proviſions of the acts of Congreſs. It is ſtated on the record that the Diſtrict Judge did not ſit in the cauſe; whether he was intereſted, or not, is a fact; and, from his not ſitting, the court will preſume that he was intereſted. 1 *Stra.* 129.

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* The queſtion might, perhaps, have been tried by a monition iſſuing to Mr. *Bingham*, from the Admiralty of *Martinique*, on which a decree would be binding upon all the world. See the argument of Sir *William Scott*, in 3 *T. Rep.* 329; and *Judge Buller's* opinion, *p.* 346. Beſides, it appears, that the *Arret* of the *French* government, authoriſing the *French* courts of Admiralty, to try and determine captures made by *Americans*, was promulged immediately after the prize had been conſigned to Mr. *Bingham's* care. *Journ. Cong.* 5 *Vol. p.* 449. 450.

1795. [BY THE COURT. This exception need not be farther answered. We are perfectly clear in the opinion, that, although the District Judge was on the bench, yet, if he did not sit in the cause, he was absent in contemplation of law; and that the case otherwise comes within the provisions of the acts of Congress.]

2*d. Exception.* It cannot be made a question on this record, that all the proper Plaintiffs were not joined in the action; since the jury have found the *Assumpsit* as it was laid in the declaration. Besides, there is nothing to shew, that there were any other parties; the owners and captors might have been the same; or the owners, by a contract with their mariners (which could not be affected by the prize resolutions of Congress) might have entitled themselves to the whole of the prizes. The statement of the fact on the motion for a new trial, is merely the allegation of the interested party, contradicted by the verdict, and the rejection of the motion.

3*d. Exception.* The court below was right in rejecting the evidence offered by the Plaintiff in error. That the papers were offered *en masse*, was his fault; and even if some of them should be deemed good evidence, all must be admitted, or none. But Mr. *Bingham's* own letters to Congress, and the correspondence with his counsel, could not be evidence, for he was a party. The *Marquis de Bouille's* certificate, which has been called an order, is nothing more than a certificate that he had previously given the order to which it refers, and it had been given in evidence by the Plaintiffs. But there is no proof that even this certificate is the act of the *Marquis de Bouille*; for, the Secretary of State only certifies, that the original of the office copy is on his files; and there is no evidence that the original was signed by the *Marquis*. Being, however, merely the statement of a pre-existing fact, and not the exemplification of a record, certified by a regular officer, it should be proved, like every other fact, in the course of a judicial enquiry, by the oath of a competent witness: the bare certificate of the *Marquis de Bouille* cannot be allowed as proof of a fact, any more than the certificate of any other respectable individual. Yet, admitting that the *Marquis* signed the certificate, and that the certificate is competent evidence of the fact, it was enough to justify the rejection, that it could have no legal effect to prevent the Plaintiffs below from recovering; for, the *Marquis de Bouille's* order merely authorised a sale of the prize goods, which the Plaintiffs never impeached; but, on the contrary, presuming the sale to be lawful, they brought an action of *assumpsit*, instead of an action of trespass, or trover. Though he might order a sale, the *Marquis* could have no power

to

to adjudge who ſhould enjoy the benefit, nor to compel Mr. *Bingham* to retain the money from its real owners. Beſides, it does not appear that the property came into Mr. *Bingham's* hands, in conſequence of the act of the *Marquis de Bouille*, nor that the *Marquis* ever had poſſeſſion of it. The *Marquis* directs the proceeds to be retained, liable to the order of Congreſs: but this could give no juriſdiction to Congreſs upon the ſubject; and Congreſs had, of itſelf, no right to decide to whom payment ſhould be made. The act of the *Marquis* is, therefore, merely void; and leaves the queſtion, as to Mr. *Bingham*, preciſely where it ſtood, before the order was written. 1795.

The reſolutions of Congreſs were, alſo, an improper kind of evidence to be admitted on the iſſue between the parties; particularly after Congreſs had become intereſted by promiſing indemnification. They were not in the nature of a law, or rule of conduct, commanding any particular act to be done by Mr. *Bingham*; they were framed ſubſequent to his act; and tho' they appeared, *ex poſt facto*, as to the ſale of the prize goods, they neither commanded that ſale, nor ordered, or approved, the detention of the proceeds, which alone conſtitutes the ground of the preſent demand*. But even if Congreſs had undertaken to iſſue ſuch orders, their authority to do ſo might reaſonably be queſtioned. That body had power to controul the operations of war; and, as an incident of war, might lawfully decide, conformably to its appellate juriſdiction, the queſtion of prize, or no prize. But here was no original ſuit, no proceſs pending, no parties before Congreſs, in relation to that point; and in relation to the private controverſy between the captors and their agent, Congreſs poſſeſſed no authority either to legiſlate, or adjudicate. Suppoſing, however, for a moment, that they had authority to decide, they have not exerciſed it; they have barely expreſſed an opinion; and can the opinion of any man, or aſſemblage of men, be given in evidence? The court had a right to judge, not only whether the evidence comes from a proper ſource, but, alſo, whether it applied to the fact in iſſue: for, even a deed is not evidence unleſs it has ſome relation to the matter in diſpute. And if the reſolutions of Congreſs were only offered in mitigation of damages, the objection remained. If not proper on the main queſtion, they were not proper

* PATTERSON, *Juſtice.* Does not the ſubſequent approbation of Congreſs amount to the ſame thing as if they had iſſued a precedent order?

Dexter. In ſome caſes that principle operates. But Congreſs had not competent authority to protect Mr. *Bingham* in the preſent inſtance, either by iſſuing a previous order, or by expreſſing a ſubſequent approbation. If an act, originally wrong, gave a party the right to recover damages, no reſolution of Congreſs could, retroſpectively, affect that right.

1795. proper on any queſtion, in the cauſe; and, on the merits it may be remarked, that although no intereſt ſhould be charged, where money is retained by a party, upon any legal compulſion, or with the conſent of the claiments, there was no reſtraint impoſed upon Mr. *Bingham* by the *Marquis de Bouille's* order, nor is any conſent pretended.

As to the record of the action of trover, *Carlton v. Bingham*, it was not pleaded: and, therefore, could not be a bar to the preſent ſuit. Neither could it be evidence; for, a verdict in *trover*, is not evidence in *aſſumpſit*. This appears from the very nature of the actions; the former depending on the proof of a wrongful act, and the latter upon a contract expreſs, or implied. The action of trover failed, becauſe the ſale of the goods was not proved to be unlawful, or tortious. 4 *Bac. Abr.* 60. 1. 3 *Mod.* 166. *Vin. Abr. tit.* "*Evidence*;" 68. 4 *Vin. Abr.* 23. *pl.* 31.

For *the Plaintiff in Error*, in reply. 1. It is objected, that the bill of exceptions does not ſtate the evidence given on the trial for the Plaintiffs below. But it does not appear, that they gave any evidence more than what the record exhibits. The ſtatute ſays, that the party aggrieved ſhall propoſe his exceptions to the opinion of the court; but there is, ſurely, no occaſion to inſert any part of the evidence, which is not material to the point of exception. 2 *Inſt.* 427.

[BY THE COURT. It is exceedingly clear, that the bill of exceptions is concluſive upon this Court. We cannot preſume, or ſuſpect, that any material part of the evidence is omitted. On this objection, therefore, nothing now need be added*.]

2. It is objected, that the papers from the office of the Secretary of State, were not proper evidence; and that though ſome were good, they could not be received, as the whole were offered *en maſſe*. The Act of Congreſs, however, (15th Sept. 1789) makes copies under the official ſeal of the Secretary as valid in proof as the originals; and it is no reaſon for rejecting the papers, when offered by the Defendant, that they, or a part of them, had been previouſly given in evidence by the Plaintiffs. The Court, too, might have ſeparated thoſe that were evidence from the reſt. As to the contents of the papers: The letters of Mr. *Bingham* were material to ſhew that he acted as the public Agent of Congreſs; that, as ſuch, he had taken depoſitions and tranſmitted the ſhip's papers, and that he had accounted to Congreſs for the property. The correſpondence with his counſel, merely ſhews, that his effects had been attached

* CUSHING, *Juſtice*, did not ſeem to coincide in this opinion, but the other three Judges were decided.

tached on account of this demand; and, under particular circumſtances, the party's own acts are evidence in his favour. 12 *Vin. Abr.* 24. *p.* 34, 35. 2 *Eq. Abr.* 409. The *Marquis de Bouille's* order, given in evidence by the Plaintiffs, was only a tranſlation, while the *French* original, offered by the Defendant, was rejected. The certificate of a Chief Executive Magiſtrate, is good evidence without an oath. 3 *Bl. Com.* 333. The certificate would prove, that the cauſe was entirely of Admiralty juriſdiction; and whether the certificate was *ex poſt facto*, or not, the Jury ought to decide. The 17th article of the *French* Treaty relates to captures from *Enemies*; but this was a capture from a *Neutral*; ſo the Governor had a right to interfere. The Reſolutions of Congreſs are ſtated in the Bill of Exceptions to be concerning the ſubject matter of the cauſe; and it muſt be preſumed that the Reſolutions were ſufficiently proved. The Record of *Carlton verſus Bingham*, (when *Carlton* ſued as Bailiff to the owners) ought certainly to have been admitted in mitigation of damages, as it ſhews that Mr. *Bingham* could not have paid the money with ſafety to the preſent claimants, till the queſtion of prize was determined. 4 *Co.* 94. *b.* 1795.

The Judges, after ſome adviſement, delivered their opinions, *ſeriatim.*

PATTERSON, *Juſtice.* I am clearly of opinion, that the certificate of the *Marquis de Bouille*, regiſtered in the Admiralty of *Martinique*, ought to have been admitted as evidence upon the trial of this cauſe. He was Governor of the Iſland, poſſeſſing a high executive and ſuperintending controul; and we muſt preſume, that he acted, on this occaſion, with legitimate authority.

Thoſe letters which were written to Congreſs by Mr. *Bingham*, at the time of the tranſaction, ſhould, likewiſe, in my opinion, have been ſubmitted to the Jury. On the arrival of the captured veſſel, the Governor might have awarded abſolute reſtitution: but, chuſing to adopt a middle courſe, he directed the cargo to be ſold, and the proceeds to remain in the hands of Mr. *Bingham*, as the Agent of Congreſs, till Congreſs ſhould inſtruct him how to act. In the character of a public agent, therefore, Mr. *Bingham* received the property; and his cotemporaneous correſpondence on the ſubject, in that character, with the *American* government, was, certainly, proper evidence, to ſhew the original nature and complexion of the facts in controverſy. I have more doubts on the admiſſibility of the other letters referred to in the Bill of Exceptions; but, in relation to them, it is unneceſſary to give a decided opinion.

With reſpect to the Reſolutions of Congreſs, two queſtions may be propoſed, in order to determine, whether they ought to have been admitted as evidence: 1. Had Congreſs authority

1795. to paſs ſuch Reſolutions? and 2. Did the Reſolutions relate to the ſubject of the controverſy? I have lately had occaſion, in the caſe of *Doane verſus Penhallow**, to expreſs my ſentiments at large on the authority of Congreſs (of which, in its application to the preſent object, I do not entertain the ſlighteſt doubt) And no man of common candour can heſitate, for a moment, to pronounce, that the Reſolutions have an immediate and neceſſary connection with the merits of the cauſe. They ought, then, to have been admitted; but what ſhould be their force and operation, is another point, not, at preſent, before the Court.

I am, alſo, of opinion, that it was improper to reject the Depoſitions, which Mr. *Bingham* had taken, in his public, official, character, to aſcertain the circumſtances of the capture, and the property of the veſſel and cargo, at the time the ſuppoſed prize was carried into *Martinique*.

IREDELL, *Juſtice*. It appears ſatisfactorily to me, that many of the documents offered in evidence, have been improperly rejected. From an inſpection of all the papers, which are attached to the Record, the nature of the diſpute may be eaſily aſcertained. The Plaintiffs alledge that Mr. *Bingham* received, on their account, as their agent, property which had been captured by them as prize; and that, whether the capture was lawful, or not, he was bound to account to them, though they might be reſponſible to the original owners, if any wrong had been committed. To this charge, Mr. *Bingham* anſwers, that he never was the Agent of the Plaintiffs, but a Public Agent; and that he did not receive the property from them on their account; but from the *Marquis de Bouille*, on account of the true owners. Admitting either of theſe poſitions, a direct and certain conſequence will inſue. If the Plaintiffs are right, the conſequence is, that Mr. *Bingham* ought to ſurrender the prize property, or account for its proceeds, to them; and though they, as captors, may be ſued by the neutral claimants, the exiſtence of a neutral claim will not juſtify his refuſal ſo to ſurrender, or account. But, if the Defendant is right, the conſequence is, that he ought not to deliver up the property to the Plaintiffs until it has been aſcertained that the capture was lawful, which muſt be done through the medium of a Prize Court, not by a Judgment in a Court of common law. From this view of the controverſy, therefore, it muſt be of great moment that Mr. *Bingham* ſhould have an opportunity to ſhew, that he had acted, throughout the buſineſs, as the Public Agent of the *United States*;

* See the Caſe referred to, *poſt*. I have not thought it material to preſerve the order of time, in which the Caſes occurred, any further than by deſignating the reſpective Terms.

States; and that his communications to Congreſs were open, fair, and faithful. If, indeed, he had given *parol* teſtimony on theſe points, his opponents might have called for the records of the appointment and correſpondence, as affording higher proof. I am, therefore, of opinion, that Mr. *Bingham's* official letters, (ſome of which were written before any diſpute exiſted, or could reaſonably be anticipated) ought not to have been rejected. 1795.

The Reſolutions of Congreſs, likewiſe, were proper evidence;—not, indeed, to prove, that the Plaintiffs were not entitled to the money in queſtion, but to prove that the Defendant was recognized in the tranſaction as the Agent of Congreſs. The Reſolutions are not to be conſidered as the mere expreſſion of a Congreſſional opinion, but as an acknowledgment that Mr. *Bingham* was a public agent, and that the public, as his principal, was accountable for the money.

The certificate of the *Marquis de Bouille*, whether regarded as an original order, or as the evidence of a parol order, previouſly given, ought to have been laid before the jury. The *Marquis* acted officially, as Governor and Commander in Chief; and we muſt preſume, that he exerciſed a lawful authority, in a lawful manner.

Under theſe circumſtances it only remains to conſider, what courſe ſhould be purſued by the Court, in order to give the Defendant the benefit of a trial, upon a full view of his legal proofs. I think, for that purpoſe, that a *Venire Facias de novo* ought to iſſue. For, although a Court of common law has no juriſdiction of the queſtion of prize; yet, whether it is neceſſary in the preſent caſe to determine that queſtion, muſt depend upon the facts, which are eſtabliſhed at the trial. On a Count for money had and received, &c. the Court below has, *prima facie*, juriſdiction; and if the jury ſhall think Mr. *Bingham* was merely the agent of the Plaintiffs, the validity of the capture, as prize, can form no ingredient in deciding the iſſue. If, on the contrary, the jury ſhall think Mr. *Bingham* acted as a public agent, their verdict muſt be in his favour; as he was bound to keep the property for the real owners; and the captors can never ſhew that they are the real owners, until the veſſel and cargo have been condemned as prize, by a competent tribunal. The captors may then proceed againſt Mr. *Bingham* in a Court of Admiralty, whoſe decree of condemnation, operating againſt all the world, would entitle the captors to receive the money, and juſtify Mr. *Bingham*, or Congreſs, in paying it.

WILSON, *Juſtice*. In ſeveral inſtances, I concur in the ſentiments, that have been delivered by the Judges, who have preceded me; but, I think, it is unneceſſary to ſpecify the particulars

1795. ticulars, or to amplify the reaſons, ſince I continue clearly in my opinion on the point, which was ſeparately argued, that this cauſe is excluſively of Admiralty juriſdiction. On that ground I chuſe entirely to reſt the judgment that I give: but it leads inevitably, alſo, to another concluſion, that, the Court not having juriſdiction, a *Venire Facias de novo* (which, in effect, directs the exerciſe of juriſdiction) ought not to iſſue. I am, therefore, for pronouncing, ſimply, a judgment of reverſal.

PATERSON, *Juſtice.* I cannot agree to ſend a *Venire Facias de novo* to a Court, which, in my opinion, has no juriſdiction to try, or to decide, the cauſe.

CUSHING, *Juſtice.* I ſhall give no opinion upon the queſtion of affirming, or reverſing, the Judgment of the Court below. My brethren think there is error in the proceedings; and they are right to rectify it. On the queſtion, however, of awarding a *Venire Facias de novo*, I agree with Judge IREDELL: But, as the Court are equally divided, the Writ cannot iſſue.

Judgment reverſed; but no writ of *Venire Facias de novo* was awarded.

The UNITED STATES *verſus* Judge LAWRENCE.

A MOTION was made by the Attorney General of the United States *(Bradford)* for a Rule to ſhew cauſe why a *Mandamus* ſhould not be directed to JOHN LAWRENCE, Judge of the Diſtrict of *New-York*, in order to compel him to iſſue a warrant, for apprehending Captain *Barre*, commander of the frigate *Le Perdrix*, belonging to the French Republic.

The caſe was this:—Captain *Barre*, ſoon after the diſperſion of a *French* convoy on the *American* coaſt, voluntarily abandoned his ſhip, and became a reſident in *New-York*. The Vice-Conſul of the *French Republic*, thereupon, made a demand, in writing, that Judge *Lawrence* would iſſue a warrant to apprehend Captain *Barre*, as a deſerter from *Le Perdrix*, by virtue of